1992

Petersen Electric, Inc. v. David R. Williams : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

PETERSEN ELECTRIC, INC.,

Plaintiff and Appellee

vs.

DAVID R. WILLIAMS,

Defendant and Appellant

Case No. 920170-CA

ARGUMENT PRIORITY CLASSIFICATION 16

BRIEF OF APPELLEE

Appeal from the Third District Court, Salt Lake County,
the Honorable Judge Timothy R. Hanson, Presiding

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STATEMENT OF JURISDICTION

This court has jurisdiction pursuant to Utah Code Ann. §78-2a-3(2)(j).

STATEMENT OF THE ISSUES

1. Whether the lower court's finding of fact that plaintiff's bills to defendant became due and payable on the 10th of the month after billing, (thereby starting the running of the four year Statute of Limitations) is clearly erroneous.

Standard of Review: Findings of fact should not be set aside unless clearly erroneous, and due regard must be given to the opportunity of the trial court to judge the credibility of the witnesses. Rule 52(a), Utah Rules of Civil Procedure.

2. Whether the lower court's finding of fact that defendant's long time employee had apparent authority to purchase a generator is clearly erroneous.

Standard of Review: Findings of fact should not be set aside unless clearly erroneous, and due regard must be given to the opportunity of the trial court to judge the credibility of the witnesses. Rule 52(a), Utah Rules of Civil Procedure.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

None

STATEMENT OF THE CASE

This case involves plaintiff, Petersen Electric Inc.'s action against defendant David Williams for goods and services delivered by plaintiff on a time and material basis. The plaintiff performed

the work for defendant on an hourly rate plus materials and then later sent bills for the defendant to pay. The defendant did not know the amount to pay until after receiving the bill. Notwithstanding the fact the plaintiff's action was brought within 4 years of the date that defendant received bills, defendant claims that plaintiff's action is barred by the Statute of Limitations.

The lower court made a finding of fact that the plaintiff's bills to defendant did not become due and payable until the 10th of the month following billing. The plaintiff contends that the Statute of Limitations did not begin to run until the bills became due and payable, thereby making plaintiff's present action against defendant timely.

One of the items that defendant purchased from plaintiff was a generator. The generator was ordered by defendant's long time trusted employee, Mr. Don Lloyd. Prior to Mr. Lloyd's ordering a new generator the defendant had asked that the plaintiff repair defendant's older generator. At that time the parties thought the only thing wrong with the generator was a "seized" engine. However, when plaintiff began to take the old generator apart, it discovered that not only was the engine "seized," the armature in the generating portion was burned making the generator worthless. Thereafter, this information was conveyed to the defendant. Mr. Lloyd later called the plaintiff and placed an order for a new generator. The new generator cost roughly the same amount as it would have cost to rebuild the old generator. The lower court entered a finding of fact that Mr. Lloyd, at the time he ordered

the new generator to replace the worthless old generator, was acting with apparent authority from defendant. On appeal, defendant disputes this finding of fact.

STATEMENT OF FACTS

1. Plaintiff, Petersen Electric, Inc., is a Utah Corporation owned by Mr. Mac Petersen. Plaintiff is in the business of electrical contracting, radio communications, and generator sales and services.

2. Defendant, David Williams, is the owner of two companies, Industrial Communications Inc. and General Broadcasting Inc. dba KFAM Radio Station. Although both companies are now corporations, the lower court found that at the time of the sales and services relevant hereto, both companies were dba's or alter egos of Mr. Williams. (R. 332-333) Thus, plaintiff's judgment in this case is entered against Mr. Williams personally. (R. 353)

3. Plaintiff's action is for unpaid credit sales and services. The lower court found that sums set forth in invoices marked as trial exhibits 3, 12, 13, 14, 15, 16, 17 and 18 in the total amount of $13,424.74, were properly owed by defendant and were not barred by the Statute of Limitations since suit was filed within four years of billing. The court ruled that invoices introduced as exhibits 2, 4, 5, 6, 7, 8, 9, 10 and 11 were not owed by the defendant since these invoices were billed more than 4 years before plaintiff instituted legal action. (R. 347-350)

4. Plaintiff and defendant have a business relationship extending back approximately 20 years. (R. 394-395) During 13 or

14 years of this time defendant had an employee he characterized as trusted and valuable. (R. 542, lines 7-8) This employee, named Don Lloyd, served as Service Manager in one of Mr. William's companies and Chief Engineer in another. (R. 580-592) In the course of business dealings it was common practice for Mr. Lloyd to call plaintiff and other vendors to order services and materials on behalf of defendant's companies. (R. 424-425, R. 585, R. 594, R. 608, R. 619) Mr. Lloyd signed work authorizations on behalf of defendant when the vendor required such. (R. 629, lines 10-25) Mr. Lloyd signed for goods delivered on credit. (R. 631-632) Mr. Lloyd negotiated modifications in partially performed contracts. (R. 397, lines 3-11) Overall, Mr. Lloyd had very broad authority to purchase goods for defendant's companies. As one vendor testified at trial, Don Lloyd "was the man to talk to" at defendant's companies. (R. 626, line 4) Mac Petersen testified that in his company's relationship with defendant's companies, defendant turned virtually everything over Don Lloyd. (R. 397)

5. Plaintiff provided its services to defendant on a time and material basis. (R. 307) Plaintiff's employees would keep daily records of the hours worked and materials used. (R. 421, 658) The daily diaries would later serve as the basis for a bill or invoice sent by plaintiff to defendant. The invoice summarized the work, the number of hours, the hourly rate and the cost of materials to reach a final invoice amount. (See e.g. Trial Exhibit 18)

6. Sometimes plaintiff delayed sending a bill to defendant to make sure that the work performed by plaintiff solved the problem the defendant had been having. Sometimes bills were delayed for other reasons which the lower court found "reasonable." (R. 311, 346)

7. The invoices did not become due and payable until the 10th of the month after billing. (R. 335) Each of the invoices stated "terms net 10th prox." indicating payment was due on the 10th of the month following billing. (R. 456-457) Many such invoices were signed by defendant's authorized employees. (R. 545-546, Trial Exhibits 2, 5, 9, 10, 11) The plaintiff did not expect payment until after billing. (R. 470, lines 8-12) The defendant did not know the amount to pay until after billing. (R. 307) The defendant did not believe he was required to pay until the bill came in. (R. 528, line 18)

8. All of the invoices set forth in trial exhibits 3, 12, 13, 14, 15, 16, 17 and 18 were mailed to defendant on September 30, 1985 or after. Plaintiff filed this lawsuit on October 3, 1989.

9. The lower court entered a specific finding of fact that under the arrangements between plaintiff and defendant, payment did not become due until the 10th of the month after billing. Thus, all of plaintiff's invoices allowed by the lower court did not become due and payable until October 10, 1985 at the earliest. (R. 335)

10. One of the items sold by plaintiff to defendant was a backup generator for defendant's broadcasting facilities on Kesler

Peak to the West of Salt Lake City. This sale became necessary after plaintiff's employees flew with defendant's employee, Don Lloyd, to the defendant's transmitter on Kesler Peak. (R. 430) The purpose of the trip was to repair the generator on the mountain. When the crew arrived it was discovered that the gasoline engine that drives the electricity generating armature in the generator was "seized." Consequently, the entire generator had to be flown down the mountain to the plaintiff's shop. (R. 431)

11. After the generator was down the mountain, defendant, David Williams took a quote from plaintiff for fixing the seized engine. At that point both parties assumed the seized engine was the only thing wrong with the generator. (R. 431, lines 20-25) Mr. Williams then directed plaintiff to do the work. After plaintiff's shop foreman began taking the generator apart, plaintiff discovered that not only did the generator have a seized engine, but the other main part of the generator, the armature, was also burned out. (R. 432, 568, 642) This discovery left the generator worthless and made the cost of repairing the old generator about the same cost as buying an entirely new generator. (R. 432-434, R. 644, lines 21-25, R. 647)

12. After learning this new information, Don Lloyd called the plaintiff on the telephone and placed an order on behalf of defendant's company for a new generator. (R. 434)[1] Relying upon

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[1]Defendant claims that Don Lloyd testified at trial that plaintiff did not tell Don Lloyd that Mr. Williams had asked that the generator be repaired. Defendant refers to R. 585 (see defendant's brief p. 12). Don Lloyd did not testify in the manner in defendant's brief. Mr. Lloyd never made the statement defendant

this order plaintiff ordered a new generator from the manufacturer (plaintiff did not have commercial generators of that type in stock). (R. 645)

13. After plaintiff delivered the new generator to defendant Don Lloyd called Mr. Petersen to ask if Mr. Petersen could rewrite the invoices to show the generator as a rebuild rather than a new generator. (R. 435) This was the first plaintiff learned that Mr. Lloyd was being second guessed by Mr. Williams. (R. 435-436) However, by then plaintiff had already incurred the liability with his supplier. (R. 437) At trial Don Lloyd testified when he placed the order he thought Mr. Williams would want a new generator rather than a total rebuild for the same price.

14. The lower court made a finding of fact that Don Lloyd acted with apparent authority in ordering the new generator. (R. 308-309) The lower court also found that ordering a new generator was the economically advisable action for the defendant to have taken when Mr. Lloyd placed the order on behalf of defendant. (R. 308-309).

SUMMARY OF THE ARGUMENT

1) In determining the indent of the parties on an oral contract, the trial court should consider all the evidence, including the contract's purpose, nature and subject matter.

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attributes to Mr. Lloyd. (See R. 585) Moreover, it is obvious from the abundance of testimony that Mr. Lloyd knew that the generator had been sent in for repair, but that plaintiff had found the generator worthless. (R. 581, lines 16-21, R. 582, R. 430, R. 433) After all, Mr. Lloyd directed the initial trip to retrieve the generator off the mountain. (R. 430)

Construction of an oral contract is for the trier of fact. The lower court in this case determined that the evidence demonstrated defendant's debt to plaintiff was not due and payable until the 10th of the month following billing. The great weight of the evidence supports the lower court's finding of fact in this regard. Since the debt did not become due and payable until 10 days after billing, the 4 year Statute of Limitations did not begin to run until 10 days after billing. Hence, plaintiff's law suit against defendant is not barred by the four year Statute of Limitations.

2) The lower court's finding of fact that defendant's employee, Don Lloyd, acted with apparent authority in purchasing a generator on behalf of defendant is supported by the weight of the evidence and is not clearly erroneous.

ARGUMENT

I.

THE FOUR YEAR STATUTE OF LIMITATIONS BEGAN TO RUN ON THE 10TH OF THE MONTH FOLLOWING BILLING, THE DATE THE BILL BECAME DUE AND PAYABLE

The plaintiff in this case commenced its action within four years of the time the defendant received bills. The defendant argues that the Statute of Limitations barred the plaintiff's action because the statute began to run from the time the contracts were performed rather than the time that the defendant was billed. This argument fails because: 1) the lower court made a specific finding of fact that the bills did not become due and payable until the 10th of the month following billing and the evidence plainly supports this finding of fact; 2) pursuant to Rule 52(a) of the

Utah Rules of Civil Procedure, the court's finding of fact cannot be overturned unless clearly erroneous; and, 3) as a matter of law credit sales, such as the ones from Petersen Electric to David R. Williams only become due on demand (or billing) unless the contract specifically states otherwise; in the present case, demand was not made until Petersen Electric sent its bills.

The following subsections will consider each of these arguments in further detail.

A. The "Clearly Erroneous" Standard of Review Applies to the Lower Court's Finding Fact that "the Invoices did not become Due Until the 10th of the Month Following Billing."

This case was tried to the court, Judge Timothy R. Hanson. The defendant contends that no deference should be given to Judge Hanson's conclusions on the Statute of Limitations issue. (defendant's brief P. 2) Defendant further argues that payment is due upon performance "absent an agreement to the contrary." (appellant's brief P. 7) Defendant then goes on to state:

> Each agreement in its fundamental terms was: When Petersen provides the specified materials, supplies or labor, then Williams will pay. Williams' obligation to pay accrued immediately upon final delivery and performance giving Petersen an immediate right to sue for payment.

(defendant's brief P. 8).

Defendant makes this statement without reference to the record and cites no support for this statement. Based upon this statement defendant argues that the Statute of Limitations began to run before defendant was even billed for the work. Unfortunately, defendant overlooks the fact that Judge Hanson made findings of

fact that control this issue and his findings are subject to the "clearly erroneous" standard of review. In other words defendant's entire argument is based upon facts contrary to those found more believable by Judge Hanson.

By using the words "absent an agreement to the contrary" defendant admits that the intent of the parties governs. Hence, if the parties intended that payment be due only after billing, this intent controls. Judge Hanson made a specific finding of fact indicating his conclusion that the parties intended that payment was not "due and payable until the 10th of the month following billing at the earliest." (R. 335, finding of fact number 10) Furthermore, the court found that the bills were calculated on a time and material basis and not on a firm quotation basis as defendant had contended. (R. 333) In its Memorandum decision the court stated:

> As to the claims of the plaintiff in general as to the amount of work performed and the amount charged, the Court finds that the best evidence supports the factual finding and the conclusions as suggested by the plaintiff that the work was performed on a time and materials basis, as opposed to a firm quote as suggested by the defendant . . . .
>
> The Court finds that the defendant's evidence on this issue is inconsistent and nonpersuasive.
>
> (R. 307).

This finding supports the conclusion that billing was necessary before the debt became due and payable since defendant would not know the amount of time or materials for which he was to be charged until a bill was actually sent.

Rule 52(a) of the Utah Rules of Civil Procedure, states in part, "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."[2] A finding of fact is only "clearly erroneous" if it is against the clear weight of the evidence or if it induces the definite and firm conviction that a mistake has been made. Grimm v. Roberts, 784 P.2d 1238 (Utah Ct. App. 1989); Maughan v. Maughan, 770 P.2d 156 (Utah Ct. App. 1989); Monroc, Inc. v. Sidwell, 770 P.2d 1022 (Utah Ct. App. 1989). This court has previously held that if a trial court bases its construction of a contract on "extrinsic evidence of intent, the construction is reviewed as a question of fact and our review is strictly limited." Craig Food Industries, Inc. v. Weihing, 746 P.2d 279, 283 (Utah App. 1987). To successfully challenge the trial court's finding, the defendant must marshall all of the evidence supporting the finding and then demonstrate that the evidence is legally insufficient to support the finding even when it is viewed in the light most favorable to the trial court. Reid v. Mutual of Omaha Insurance Co., 776 P.2d 896, 899-900 (Utah 1989). Accordingly, Judge Hanson's finding of fact that the debt did not become due and payable until after billing should not be overturned unless the weight of the evidence clearly indicates that he made a mistake. As shall be demonstrated hereafter the evidence

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[2]The rule goes on to say that findings of fact can be manifested in formal findings or in a memorandum decision. In this case the court entered both.

supports the conclusion that the intent of the parties was that the debt be due and payable only after a bill was sent.

B. The Lower Court's Finding of Fact that Payment did not become Due Until After Billing is Supported By The Evidence.

The terms and conditions of a contract are governed first and foremost by the intent of the parties. Winegar v. Froerer Corp., 813 P.2d 104, 108 (Utah 1991). Construction of an oral contract, "is for the trier of fact." In re Relationship of Eggers, 638 P.2d 1267 (Wash App. 1982). The intent of the parties may be demonstrated by their actions. Eie v. St. Benedict's Hospital, 638 P.2d 1190 (Utah 1981). In determining the intent of the parties the court should consider the contract's "purpose, nature and subject matter." Driggs v. Utah State Teachers Retirement Board, 142 P.2d 657 (Utah 1943). In considering the "purpose, nature and subject matter" of the contract in the present case there is ample evidence to support the lower court's finding of fact that payment was not due until the 10th of the month after billing.

First, as earlier stated, the lower court found that the contracts were time and material contracts. The defendant seldom asked prices in advance. (R. 419-420) The plaintiff billed defendant an hourly rate for its work, plus materials, in much the same way that a law office bills its clients an hourly rate plus costs. (R. 419-420) In this form of billing the customer does not know when to pay, the amount to pay, or even a full description of the work performed until after he or she has been billed. The

defendant admitted at trial that he did not keep records showing amounts owed before the bill came in. (R. 555-558).

In the present case the defendant suggests that plaintiff had the right to sue before even sending a bill. (defendant's brief P. 8) However, with a time and materials contract can it be said that defendant breached his agreement to pay before he even knew the amount to pay? The Utah Supreme Court has said the Statute of Limitations cannot begin to run until a breach occurs. Fredericksen v. Knight Land Corporation, 667 P.2d 34, 36 (Utah 1983); M.H. Walker Realty Co. v. American Surety Co., 211 P.998 (Utah 1922). The defendant in this case could not have breached his contract before even being told the amount owed. Certainly it was the expectation of the parties that some type of bill or notice be sent before payment became due. On this point one court has stated "where (as in the instant case) demand or notice is a condition precedent, it is universally held that the Statute of Limitations does not commence to run until the notice or demand is given." Stice v. Peterson, 355 P.2d 948, 953 (Colo. 1960). In this case notice, in the form of a bill, was a condition precedent to payment, and to any breach, because Mr. Williams did not know how much to pay until billed.

The evidence in this case indicates that Mr. Williams himself did not consider the debt due and payable until he received a bill. In fact, one of Mr. Williams' claims at trial was that he was never billed. The trial court noted in its memorandum decision "[w]ith respect to the defendant's claim that he never received any of the

invoices representing work done by the plaintiff, the Court finds no merit to that claim." (R. 310) The fact that defendant chose to defend his case on the claim that he never received plaintiff's bills is evidence of defendant's belief that billing was a necessary condition to payment.

Further evidence of defendant's intent is found in his own testimony concerning instructions given to his employees. He told his employees to pay the debt "when the bill comes in." (R. 528, line 17, R. 555, line 11) Put another way, the employees were not to pay the debt until a bill was received.

Further evidence supporting the court's finding of fact that payment was not due until after billing, comes from the invoices themselves. The defendant claims these invoices were "one sided ministerial acts, unilaterally sent, which did not affect the substance of the transaction." (defendant's brief P. 11) Defendant further quotes a 1968 Arizona case for the proposition that invoices are not bills of sale. Farm & Auto Supply v. Phoenix Fuel Co., 442 P.2d 88 (Arizona 1968). Unfortunately, the evidence of the present case completely refutes these assertions.

It is clear the bills were not "one-sided" as claimed by the defendant. The plaintiff and defendant had been doing business and billing each other for about 20 years. (R. 394-395) On these invoices, as demonstrated by the trial exhibits, the words, "Terms Net 10th prox." appeared. Mr. Petersen testified that these words meant payment was due on the 10th of the month after billing (R. 456-457, R. 146 ¶12) Mr. Petersen clearly testified that it was

his intent that payment be due only after billing. (R. 456-457, see also R. 146) Also, the invoices say "please pay on this invoice" thereby indicating plaintiff's intent that the invoice serve as a bill. Moreover, over the years many of the invoices with these terms "Net. 10th prox." were signed by Mr. Williams' authorized employees. Five of these signed invoices were included as trial exhibits. (Trial exhibits 2, 5, 9, 10 and 11)[3]

The parties' 20 year course of business dealing, was certainly a proper area of consideration for the lower court. Section 70A-2-208(1) of the Utah Code States:

> Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

(emphasis added) This court has held that where there is uncertainty, the trier of fact should examine the "background and surrounding circumstances" to make a determination. Sprouse v. Jager, 806 P.2d 219, 222 (Utah App. 1991). The background of 20 years of billing including signed invoices with the words "Terms Net. 10th prox." and "please pay on this invoice" was certainly relevant. These facts combined with the fact that defendant never paid prior to billing certainly lends support to Judge Hanson's finding of fact that the bills were not due and payable until the 10th of the month after billing.

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[3]Mr. Williams testified his employees were not acting improper in signing these invoices. (R. 545-546)

Curiously, one of the main cases defendant sites in support of its position, actually strongly supports affirmation of the lower court's decision. In William Feinstein Brothers, Inc. v. L.Z. Hotte Granite Co., 184 A.2d 540 (Vermont 1962) (cited in appellant's brief at page 7) the seller's invoices used the terms "2% 15 da 30 da 30 da net." The parties offered conflicting interpretation of this provision and a question arose as to when payment was due. The Vermont Court held that under these circumstances the issue of when payment was due was a question of fact, for the trier of fact, and not a question of law. id. at 542-543.

In the present case the meaning of the words "Terms Net. 10th prox.," was never really disputed. Mac Petersen was the only one that offered extrinsic testimony and he said it meant the invoices were due on the 10th of the month following billing. (R. 456-457) As articulated by the Vermont Court, it is for the trier of fact, in this case Judge Hanson, to make the final adjudication as to meaning and intent. The court's finding of fact that the bills became due and payable on the 10th of the month following billing shows how the trier of fact resolved the matter.

It is clear from the record the parties understood their invoices to be more than the invoices described in the definition given by the defendant. The record shows that both plaintiff and the defendant used the terms "invoices" and "bills" synonymously.

Both parties considered invoices and bills to be the same thing.[4] Furthermore, the invoices were not drawn up at the time of performance. They were drawn up after service calls were performed, from daily diaries kept by the plaintiff's employees. (R. 421) Again the closest analogy is a lawyer keeping time records from which an invoice or bill is later composed and sent. In this sense the bills sent by Petersen Electric were very different from the traditional merchandise sales tickets being described by the definition utilized by defendant. Billing by Petersen Electric was the event that summarized the work done, and signaled that the bill was due and payable. (R. 456)

Further evidence of the parties' intent that the debt was not due and payable until after billing is the testimony of Mac Petersen concerning a conversation he had with defendant. (R. 414) In the conversation defendant asked plaintiff when a bill was going to be sent on a completed project. Why would Mr. Williams ask when the bill would be sent unless he was wondering when he would be required to pay? When Mr. Petersen indicated he was going to hold off sending a bill for a while he drew no objection from defendant.

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[4](R. 395, line 8; 397, line 5; 399, line 6; 400, line 14; 402, lines 4, 5; 404, line 2; 406, line 9; 410, line 3; 411, line 25; 413, lines 12, 23; 414, lines 16, 24, 25; 415, line 2; 416, line 3; 417, line 18; 422, line 7; 423, lines 17, 19; 427, line 11; 428, line 3; 437, line 21; 442, line 14; 445, line 21; 446, line 14; 447, line 18; 449, line 9; 453, line 2; 454, line 2; 458, lines 10, 11; 459, line 10; 460, lines 4, 12, 24; 462, line 11; 463, line 13; 467, line 24; 468, line 3; 470, line 9; 471, line 9; 472, line 9; 478, lines 16, 25; 484, line 4; 572, lines 7, 10; 573, lines 3, 4, 6, 11, 13, 16, 20; 575, lines 12 13, 17, 23; 576, line 1; 577, lines 9, 10; 578, lines 15, 19, 22; 621, line 2; 622, line 2; 659, line 10; 661, line 1).

The tenor of the conversation is that both plaintiff and defendant considered billing a prerequisite to the obligation becoming due and payable. As indicated earlier, a bill must become due and payable before the Statute of Limitations can begin to run. O'Hair v. Kounalis, 463 P.2d 799, 800 (Utah 1970).

Further evidence that the parties did not consider the debt due and owing can be found in the record:

> All plaintiff's trial exhibits. Finance charges were only assessed by plaintiff after billing, not from date of performance.
>
> R. 423: Bills were sometimes not sent out until a month or two after equipment was repaired in order to assure the problem was fixed before requesting payment. Indicates that payment was not expected until bill sent.
>
> Trial Exhibit 25: In letter from David Williams to Mac Petersen, Mr. Williams several times refers to the invoices as bills.
>
> R. 447 & 453: Testimony indicates that invoices are bills.

Overall, the evidence indicates that Judge Hanson made a correct finding of fact. There is no clear error. Moreover, defendant has not even appealed the court's finding that plaintiff performed the work satisfactorily and was not paid. The Utah Supreme Court has said "when an admitted service has been rendered and not paid for, natural justice makes a strong appeal." Bishop v. Parker, 134 P.2d 180, 182-183 (Utah 1943). Under these circumstances this court should affirm the lower court's decision.

C. Credit Sales Without a Specified Due Date become Due and Payable on Demand.

The defendant, relying upon the lower court's ruling that the defendant did not maintain an "open account" with plaintiff, seems to argue that this finding makes plaintiff's sales to defendant cash transactions. If this is what defendant is saying this is simply incorrect. In the first place plaintiff never received any cash, or else we would not be before this court. Furthermore, a review of the evidence, arguments and rulings makes it apparent that the plaintiff's sales and services were rendered on credit even though defendant may not have had an "open account" with the plaintiff. Finally, as a matter of law credit sales such as these are not due and payable until demand, unless an agreement specifies the due date.

The issue of whether an open account exists is relevant in this case for those unpaid invoices that were billed prior to September of 1985 and were thus barred by the four year Statute of Limitations unless they could fall into the open account exception of §78-12-25 of the Utah Code. Under this exception, invoices billed more than four years prior to filing the suit would not be barred by the Statute of Limitations if the invoices were part of a series of charges on an "open account." Defendant contended before and during trial that the series of charges did not constitute an open account, but were independent transactions. Relying upon Bishop v. Parker, 134 P.2d 180, 182-183 (Utah 1943) defendant argued that eleven elements were required for an open account.

1. An Account;
2. Usually kept;
3. Properly kept;
4. By express or implied agreement;
5. Containing a connected series of debit and credit entries or reciprocal charges and allowances;
6. Having as an intention of the parties that individual items not be considered independently; but as a continuation of a related series;
7. Account kept open;
8. Subject to shifting balance;
9. Open until either party settles or closes account;
10. One single and indivisible liability;
11. Liability fixed at time of settlement after last entry.

(R. 281).

Defendant argued that an open account did not exist because these elements, especially those of a running account balance, and a relationship between transactions were not present. (R. 282-283) The defendant stated the evidence "more properly described a credit account arrangement or a quote and billing practice." (R. 282) Thus, at trial defendant did not argue that the transactions were not credit arrangements, only that the credit transactions, when viewed together, did not constitute an open account.

In ruling on the issue of open account the court said:

> On the plaintiff's claim that it dealt with the defendant on an open account, the Court is satisfied that the elements of establishing an open account have not been met by the plaintiff.

(R. 310) (emphasis added).

The court went on to hold that invoices billed more than four years before suit was commenced are barred by the Statute of Limitations and plaintiff has not appealed that decision. However, the language of the ruling makes it apparent that the court was only ruling that the elements for an open account did not exist,

not that the sales were not credit transactions. Clearly the sales were credit transactions since the time and materials billing only allowed payment after performance and billing. Mac Petersen clearly believed he was providing services on credit. (R. 470-471) Even the defendant's closing argument admitted that the evidence pointed toward "a credit account arrangement or a quote and billing practice." (R. 282)

Defendant asserts that it is "universally held" that the Statute of Limitations commences running on performance. Defendant draws support for this statement from §70A-2-310(a) of the Utah Uniform Commercial Code. However, defendant overlooks §70A-2-310(d), the subsection applicable to credit sales which states:

> where the seller is required or authorized to ship the goods on credit the credit period runs from the time of shipment <u>but postdating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period.</u>

(emphasis added)

In the present case in those circumstances where plaintiff delayed billing, the credit period did not begin to run until the bill was sent. If the credit period did not start during that time the Statute of Limitations did not begin to run.

With respect to <u>credit</u> <u>sales</u> the correct "universal rule" has been articulated as follows:

> If the contract fixes no time for payment, payment is due on demand, unless the debtor is admittedly unable to pay, which obviates the necessity for making a demand.[5]

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[5] 60 Am Jur 2d, P. 887.

Accordingly, this court, as a matter of law as well as upon the findings of fact, should affirm the lower court.

II.

THE PLAINTIFF PROPERLY RELIED UPON DON LLOYD'S APPARENT AUTHORITY WHEN IT ORDERED A GENERATOR FROM ITS SUPPLIER. DEFENDANT IS BOUND BY THE ACTIONS OF HIS AGENT.

With respect to defendant's argument that his agent, Mr. Don Lloyd, had no authority to purchase a new generator, an overall reading of the testimony shows that in making his argument, defendant has selectively pointed this court to the evidence most favorable to his own position. The defendant ignores the fact that the lower court in this case consistently found plaintiff's evidence more believable both on the agency issue and on all other issues.[6]

Defendant again urges that no deference be given to the lower court's findings of fact that defendant's agent had apparent authority to purchase a generator. (appellant's brief p. 2) However, even in reading the agency issue as defendant has stated it, it is clear that the issue is one of fact, to which the "clearly erroneous" standard of review applies.[7] In its memorandum decision in this case, the court said:

> On the issue of the generator, the Court finds that the plaintiff supplied a new generator to the defendant at the request of defendant's agent. While the defendant

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[6]At R. 308 Court suggests defendant's evidence on the agency issue is not believable. At R. 307, court states defendant's evidence is "inconsistent and non persuasive." At R. 309 Court states that plaintiff's evidence is the most "believable and logical."

[7]See discussion of Standard of Review p. 8 to 10, Supra.

> disputes that his agent had the authority to order a new generator, there is no believable evidence that would suggest that the plaintiff had been made aware of the defendant's directions to his agent at the time the order for the new generator was placed. Defendant's agent, when the order was placed for the new generator rather than the rebuilt generator, had apparent authority to act on behalf of this principal, the defendant, and the testimony shows that the ordering of a new generator was in any event economically advisable when done. Accordingly, if the defendant has problems with the commitments made to third parties, including the plaintiff, by the defendant's agent, the defendant should look to his agent in that regard.

(R. 308-309) (emphasis added) (Also, see, Finding of Fact number 8, R. 334 which states in part "[D]defendant's agent had apparent authority to act on behalf of defendant in purchasing the generator.")

Having made these findings of facts, this court need only determine if the findings are against the clear weight of evidence. An overall review of the testimony and documentary evidence presented to the court demonstrates that Judge Hanson's findings of fact on the issue of agency and the ordering of the generator are supported and are not clearly erroneous.

A. Don Lloyd had Actual and Apparent Authority to act on Behalf of Defendant in Purchasing Goods and Services.

At trial, Don Lloyd was called as a witness for the defendant. Mr. Lloyd testified he worked for the defendant for over thirteen years. (R. 579) During that time he worked as Service Manager at one of Mr. Williams' companies and simultaneously as Chief Engineer at another. (R. 580-592) Mr. Lloyd related several occasions where he, acting as defendant's authorized agent and employee, contacted plaintiff and ordered work or materials. (see e.g. R.

585 lines 12-24, R. 608, lines 3-10) Part of Mr. Lloyd's responsibilities were to deal with vendors. (R. 594) This responsibility included Mr. Lloyd contacting vendors and telling them to perform the work or deliver the goods. (R. 594, R. 608 lines 3-10, R. 619) Mr. Lloyd said on many purchases he did not need specific authority from Mr. Williams. (R. 595) On some occasions when materials or work was ordered from plaintiff, by Mr. Don Lloyd, Mr. Williams was present thereby clearly indicating to plaintiff that Mr. Lloyd was acting with Mr. Williams' approval. (R. 424-425)

Mr. Harold Schmidt also testified about the nature of Mr. Lloyd's authority. Mr. Schmidt worked for another vendor that sold to defendant. Mr. Schmidt testified that Mr. Lloyd signed work orders on behalf of defendant. (R. 629, lines 10-25) Mr. Lloyd signed on behalf of defendant for the receipt of goods ordered on credit. (R. 631, lines 11-19; R. 632, lines 1-4)

Mr. Wen Winegar, officer of another vendor, gave further examples of Mr. Lloyd acting on behalf of defendant in ordering goods and services. (R. 624-626) To Mr. Winegar's company, Don Lloyd "was the man to talk to" when dealing with defendant's companies. (R. 626, line 4) In dealing with Mr. Winegar's company Mr. Lloyd made the initial contacts, negotiated the price, and gave final approval for the work. (R. 623-627)

Mac Petersen testified similarly about his company's dealings with defendant's companies. Mr. Petersen testified that he had known and worked with Don Lloyd as defendant's employee for many

years. (R. 396) Mr. Lloyd was Mr. Williams' "key employee" and "Dave's right-hand man." According to Mr. Petersen, "whatever Dave wanted, turned it over to Don, and Don went about it, and got the job done." (R. 396, lines 20-25).

Mr. Williams himself clearly led plaintiff and others to believe that Don Lloyd had complete authority to negotiate prices, make purchases, order work and even modify agreements. On at least two occasions, defendant sent Don Lloyd in his place to negotiate changes in prices on unpaid invoices. On those occasions Mr. Williams said "Don will handle it" or "I sent Don over to take care of those." (R. 397, lines 3-9) Don Lloyd handled most, but not all, of the credit purchases. (R. 397, lines 10-12) As already noted, Mr. Williams was present on some occasions as Mr. Lloyd ordered materials or work from plaintiff. (R. 397-398)

Even the defendant himself testified that Mr. Lloyd dealt with plaintiff in the sale or exchange of materials. (R. 527, lines 6-9) The defendant testified that Mr. Lloyd was a trusted and valuable employee. (R. 542) Mr. Williams said Mr. Lloyd could make purchases without Mr. Williams approval if it were "urgent." (R. 544-545) Other employees were authorized to make purchases on behalf of defendant as well. (R. 546, lines 1-7)

From these facts brought forth at trial, the lower court's conclusion that Mr. Lloyd had apparent authority to act on behalf of Mr. Williams in ordering a new generator is well supported. Mr. Lloyd was dealing with plaintiff in the same manner as he had for more than a decade. Furthermore, as the lower court found,

ordering a new generator, as opposed to rebuilding the old generator, made economic sense in light of the circumstances.

It should be kept in mind that a portable generator only has two main parts. The first is the gasoline engine that turns the generator, the second is the electricity generating armature. (R. 642) When plaintiff initially discussed a rebuild with Mr. Williams, none of the parties were aware that the armature needed to be replaced. (R. 432, 568) At that time the parties only knew that the engine would not start because it was "seized up." (R. 431, 641) Only after repairs on the engine commenced was it discovered the armature was also ruined. (R. 432, 642) This meant that virtually the entire generator needed to be replaced and defendant would be economically ahead buying a new generator instead of rebuilding the old. (R. 436, 605) Also, the old generator's manufacturer recommended against fixing a burned out armature. (R. 642) A burned armature is a serious and expensive problem. (R. 642, lines 20-25) At trial plaintiff's former shop foreman, an expert in the field, testified the burned out armature left the generator "worthless." (R. 644)

The discovery of the burned out armature changed everything. Rebuilding the engine portion did not make sense since defendant would still be left with a generator that was ruined. At that point, defendant had three choices: (1) have the plaintiff rebuild the engine only, as had previously been discussed by Mr. Williams and Mr. Petersen, (leaving defendant with a still worthless generator); (2) have plaintiff rebuild the engine and armature for

about the same cost as a new generator; or (3) order a new generator for about the same cost as a rebuild. Because the first alternative was really no alternative at all, the circumstances required a decision to be made by the defendant whether to rebuild the entire unit or to order a new generator. Where plaintiff had been dealing with Mr. Lloyd as defendant's "right hand man" for more than a decade, and was accustomed to dealing with Mr. Williams and Mr. Lloyd interchangeably (R. 397), plaintiff acted reasonably when it relied upon Mr. Lloyd's instructions to order a new generator.

Defendant attempts to make a point that plaintiff should have inquired into the scope of Mr. Lloyd's authority since Mr. Williams had only ordered a repair of the old generator. This argument might have had some merit had it not been discovered that the armature was burned out. However, the burned out armature made the old arrangements obsolete. Under these new circumstances Mr. Lloyd, acting with apparent authority, entered into a new contract. It should be remembered that Don Lloyd called plaintiff to place the order, plaintiff did not call defendant. (R. 434) Moreover, plaintiff was ambivalent as to whether defendant purchased a new generator or fixed the old generator since selling a new generator did not generate more revenues for the plaintiff than did rebuilding the old generator. Plaintiff simply felt defendant would be ahead with a new generator. (R. 436, lines 1-5) Accordingly, plaintiff had no reason to expect that Mr. Lloyd was acting improperly. Even Mr. Lloyd testified he thought defendant

would approve a new generator. (R. 600-601) There was nothing out of the ordinary about Mr. Lloyd's call. Everything in plaintiff's many years of dealing with defendant told plaintiff that Don Lloyd had authority to place such an order. As far as plaintiff knew Mr. Lloyd was acting with Mr. Williams' approval.

Under these circumstances, it is clear that the agent, Mr. Lloyd, did not vary the terms of an existing contract. Instead changed circumstances made the old contract impossible in the sense that a mere engine repair would not accomplish the goal of giving defendant a working generator. These circumstances necessitated the formation of an entirely new contract.

The Utah Supreme Court has stated (in the chief case relied upon by defendant):

> [T]he general principle of the law of agency is that principals are bound by the acts of their agents which are within the apparent scope of the authority of the agency and a principal will not be permitted to deny such authority against innocent third parties who have relied on that authority.

Forsyth v. Pendleton, 617 P.2d 358, 360 (Utah 1980). The plaintiff in this case is an innocent third party that relied upon an agent acting within the apparent scope of his authority. The apparent authority is adequately established by the testimony. This court should not overturn the lower court's findings in this regard.

The defendant also argues that plaintiff attempted to deceive defendant into believing that plaintiff had actually rebuilt the old generator. It should be kept in mind that the first that the plaintiff learned that Mr. Lloyd may have ordered the new generator without the approval of Mr. Williams was after Mr. Petersen had

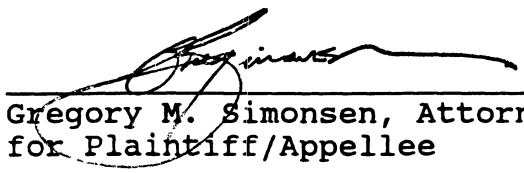
ordered the generator from his supplier, had taken delivery of the new generator, and sent a invoice to the defendant. Mr. Lloyd intercepted the invoice and called Mr. Petersen to write up the invoice as if the generator was a rebuilt generator. Both Mr. Lloyd and Mr. Petersen's testimony agree in the fact that this is the first Mr. Petersen learned of the problem. Accordingly, by the time plaintiff learned of the problem he had already performed his part of the bargain. If there was deception by Mr. Lloyd, Mr. Petersen was its chief victim. If Mr. Petersen had any idea that the new generator was not wanted he would not have special ordered it from his supplier.

The defendant has presented no compelling reason to overturn the lower court's finding of fact that apparent authority existed in defendant's agent. While defendant has cited an ancient out of state case for a general principle of law that an agent with authority to enter contracts, cannot vary a contract made by a principal, the facts of this case are different. The agent in this case ordered a new generator when it became clear that the old generator was worthless and could not be economically repaired. The agent had a long history of dealing with plaintiff and others in similar circumstances. Plaintiff's reliance upon agent was reasonable.

CONCLUSION

The Court of Appeals should affirm the decision of the lower court.

DATED this 14th day of August, 1992.



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Certificate of Mailing

I hereby certify that on the 14th day of August, 1992, I mailed four copies of the foregoing Brief of Appellee to the following:

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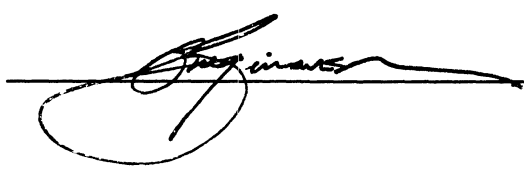

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